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# In the Supreme Court of the United States

**OCTOBER TERM, 1964**

**No. [redacted] 974**

RALPH J. PERK,
County Auditor of Cuyahoga County, Ohio,
*Petitioner,*

vs.

THE PARK INVESTMENT COMPANY,
and
BOARD OF TAX APPEALS OF THE STATE OF OHIO,
MERRILL D. BROTHERS,
ROBERT E. ZELLAR,
EDWIN F. SAWICKI,
*Respondents.*

## BRIEF OF AMICUS CURIAE THE CLEVELAND ASSOCIATION OF BUILDING OWNERS AND MANAGERS

**In Opposition to Petition for Writ of Certiorari.**

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# In the Supreme Court of the United States

**OCTOBER TERM, 1963.**

**No. 1124.**

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RALPH J. PERK,
County Auditor of Cuyahoga County, Ohio,
*Petitioner,*

vs.

THE PARK INVESTMENT COMPANY,
and
BOARD OF TAX APPEALS OF THE STATE OF OHIO,
MERRILL D. BROTHERS,
ROBERT E. ZELLAR,
EDWIN F. SAWICKI,
*Respondents.*

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## BRIEF OF AMICUS CURIAE THE CLEVELAND ASSOCIATION OF BUILDING OWNERS AND MANAGERS

**In Opposition to Petition for Writ of Certiorari.**

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### INTRODUCTION.

1. The Cleveland Association of Building Owners and Managers has about sixty member buildings in downtown Cleveland, and thus represents the Owners and Managers of approximately $250,000,000 worth of commercial and office building properties located in and about downtown Cleveland.

The membership of this Association therefore comprises a *class* whose interests in the issues and principles involved in this lawsuit are common and identical with those of the respondent taxpayer.

2. This Association desires to present a point not discussed in the briefs heretofore filed herein.

3. This point is that this lawsuit lacks some elements that are essential requirements for Federal consideration, to wit:

A. No Federal question was decided by the State Court.

B. No Federal question is now presented to this Court.

C. On the merits, the Petitioner does not make a case.

4. This Association adopts, without repeating, the statement of facts and arguments of law that are set forth in Respondent's brief.

## ADDITIONAL STATEMENT OF THE CASE.

1. The Ohio Constitution deals simply, plainly and briefly with the subject of taxation of real property. It merely provides:

> "Land and improvements thereon shall be taxed by uniform rules according to value." Art. XII, Sec. 2.

2. The undisputed evidence shows that the practice of the Ohio taxing authorities, now and for many years past, has been to classify real property according to use (not value), as follows:

Commercial Property Classification
Residential Property Classification
Industrial Property Classification
Agricultural Property Classification

The evidence gives ratios of assessed values to sales prices for the various classifications, both for Cuyahoga County and also on a statewide basis. The results are compelling.

| *Area* | *Use* | *Ratio of Assessed Values to Sales Prices* |
|---|---|---|
| Statewide | All types | 37% |
| Cuyahoga County | All types | 38% to 41% |
| Cuyahoga County | Commercial | 50% to 58% |
| Cuyahoga County | Residential | 37% to 40% |
| Cuyahoga County | Vacant Land | 37% to 44% |

This shows commercial property in Cuyahoga County about 36% above the statewide average, and 40% above the Cuyahoga County residential average. The discrimination is too large to avoid; it must be faced. These percentages are, of course, approximate averages. They are made from statistics, with special cases eliminated, col-

lected by the Respondent the State Board of Tax Appeals, and involving over 1,100,000 sales of properties with total prices over $13,100,000,000.00 and total assessed values of over $4,800,000,000.00.

3. The Amended Petition below complained that the practice above described violates and ignores the above quoted command of the Ohio Constitution for taxation of land "by uniform rule according to value," and that the discrimination "heavily burdens commercial property and greatly favors other classes of property," thus depriving the owners of commercial property of their property right "without due process of law, and denies to them the equal protection of the law, contrary to the provisions of the Constitution of the United States of America, Amendment XIV."

4. After hearing the case, the State Court's mandate directed the taxing authority,

> "to perform its statutory duties by reviewing the tax assessments in Cuyahoga County in relation to whether such assessments were made by uniform rule and, if it finds that discrepancies exist in the tax assessments, as a whole or among the various classes of property, to direct such an order as is necessary to the county auditor to equalize such assessments."

5. The Federal Constitution was not mentioned by the State Court anywhere—not in the mandate, and not in the opinion.

## ARGUMENT.

This lawsuit lacks some elements which are essential to Federal jurisdiction. Without them, the petition must fail.

### A. No Federal Question Was Decided by the State Court.

Certiorari is here available, if at all, only if some "title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of * * * the United States." 28 U. S. C. A. 1257(3). See *Palmer Oil Corporation vs. Amerada Corporation*, 343 U. S. 390; *Michel vs. Louisiana*, 350 U. S. 91, 97; *Raley vs. Ohio*, 360 U. S. 423, 436.

Petitioner made no such claim. He made no reference whatever to the Federal Constitution. Although the taxpayer-Respondent did make such a claim, the State Court decided the case in such a way that that claim never was reached for consideration. Thus, Petitioner has no Federal claim of his own, and can not use the Federal claim which the taxpayer unsuccessfully asserted. A person cannot invoke the jurisdiction of this Court to vindicate the Federal right of another whether or not a party to the litigation. *Hanson vs. Denckla*, 357 U. S. 235, 244 and cases there cited. The case went off on other grounds, and they were not Federal grounds.

Had the State Court sustained the present practice, it would then have been faced with the Constitutional question, and would have been obliged to try to justify the present practice under the equal protection clauses of the Fourteenth Amendment to the Federal Constitution and of Article I of the Ohio Constitution.

However, the State Court rejected the present practice, interpreted the State Constitution to require uni-

formity, and ordered strict compliance therewith. Thus no problem of equal protection arose and no Federal question was ever reached, considered or decided.

**B. No Federal Question Is Now Presented to This Court.**

For the reasons stated above, no Federal question is now presented to this Court. Petitioner made in the State Court no claim under the Fourteenth Amendment, and the State Court issued its mandate for compliance with the literal language of the Ohio Constitution, so that the taxpayer-Respondent's claim for equal protection under the Fourteenth Amendment never came up for consideration there, and therefore is not available to supply Petitioner with a Federal question here.

**C. On the Merits, the Petitioner Does Not Make a Case.**

At the trial, the taxing authorities offered no evidence except the rules of the Respondent, the State Board of Tax Appeals, attached to its answer; and those were thus admitted in evidence. No evidence was excluded.

The taxpayer made its case by statistics collected by the Respondent itself, the State Board of Tax Appeals, and by examination of the Board's own employees as witnesses. These statistics made an overwhelming case of discrimination (special cases had been eliminated in compiling them).

The Board and the petitioner made their defense by claiming that the the taxpayer's evidence, taken from the Board's own records, was insufficient to prove discrimination, and by asserting that the state statutes permit discrimination in spite of the plain constitutional prohibition of discrimination. The State Supreme Court vigorously rejected both of those contentions.

The petitioner attacks that result by claiming, now and for the first time asserting the Federal Constitution, a strange contention that new discrimination would result from abolishing the discrimination he now defends. This involution resembles the plea of the young man who had murdered his father, and then sought mercy on the ground that he was an orphan.

This curious argument suggests in effect that the State Court's judgment creates a new discrimination by allegedly denying to the residential property owners of Cuyahoga County privileges enjoyed by owners in the other 87 counties of Ohio, and by allegedly giving to the commercial property owners of Cuyahoga County a preferential position not enjoyed by commercial property owners in the remaining 87 counties of Ohio—in other words, that the abolition of discrimination within the county creates discrimination without the county.

In the first place, this argument assumes that taxing authorities in the other counties would fail to apply the principles established by the State Court's judgment here. However, the legal presumption is that officials will do their duty and not ignore it. *Muser vs. Magone*, 155 U. S. 240, 251; *U. S. vs. Chemical Foundation*, 272 U. S. 1, 14.

In the second place, Petitioner made no such claim in his pleadings, or anywhere in the Court below. Novel in this Court is his newly found reliance upon the Constitution as forbidding a judgment against him because it would allegedly create discriminations in relation to property owners outside of Cuyahoga County. A question not properly raised, litigated, or passed upon in the courts below will not be considered in the Supreme Court upon certiorari. *Delgadillo vs. Carmichael*, 332 U. S. 388, 391; *McCullough vs. Kammerer Corporation*, 323 U. S. 327;

*Chicago, St. P., M. & O. R. Co. vs. United States*, 322 U. S. 1, 4.

In the third place, the argument has a queer inconsistency. Is the petitioner *for* discrimination within his county, and *against* discrimination outside his county? Is the petitioner *for* discrimination generally, or is he *against* discrimination?

And all this comes in the face of a plain Constitutional provision that:

> "Land and improvements thereon shall be taxed by uniform rule according to value."

The petition should be denied.

Respectfully submitted,

J. HALL KELLOGG,

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*The Cleveland Association of Building Owners and Managers, Amicus Curiae.*